



No. 83-128

In The  
**Supreme Court of the United States**  
October Term, 1983

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UNITED STATES OF AMERICA,

*Petitioner,*  
vs.

WILLIAM GOUVEIA, et al.,

*Respondents.*

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**WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

—0—

**BRIEF OF RESPONDENT ADOLPHO REYNOSO**

—0—

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## **QUESTIONS PRESENTED**

1. Whether, under any circumstances, a federal prisoner placed in administrative detention for an indeterminate period of time, on suspicion of committing a crime in prison and undergoing a criminal investigation is constitutionally entitled to an attorney prior to indictment?
2. Whether dismissal of the indictment is the appropriate remedy where an indigent federal prisoner is held in solitary confinement for 19 months as a suspect in a murder investigation and his requests for appointed counsel are denied until he is formally indicted 20 months after the alleged crime?

**PARTIES TO THE PROCEEDING**

In addition to the parties shown by the caption of this case, Adolpho Reynoso, Robert Ramirez, Philip Segura, Robert Eugene Mills, and Richard Raymond Pierce were appellants below and are respondents here.

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**BRIEF OF RESPONDENT ADOLPHO REYNOSO**

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**STATEMENT**

This case raises the question of whether the Sixth Amendment right to effective assistance to counsel requires that counsel be appointed for an indigent prison inmate under criminal investigation during the time that he is held in administrative segregation as a suspect fol-

lowing the alleged offense, but before the filing of an indictment.

### **1. Factual Background of Respondent Reynoso's Case**

On October 13, 1978, Respondent Reynoso became an inmate at the Federal Correctional Institution at Lompoc, California. On October 20, 1978, respondent was transferred to "J" Unit at Lompoc. (J.A. 15)

On November 11, 1978, an inmate named Thomas Trejo was stabbed to death in "M" unit at Lompoc. There were no eyewitnesses to the murder. The body of Trejo was discovered at approximately 4:00 in the afternoon.

That evening, Respondent Reynoso, along with Pedro Flores (acquitted in the first trial of all counts), was placed in the Administrative Detention Unit (ADU) at Lompoc, a unit segregated from the general prison population. (J.A. 8, 10, 15, 44, 50)

As a result of his placement in ADU, Respondent Reynoso was confined to a one-man cell measuring four feet by six feet, around the clock, with the exception of thirty (30) minutes per day. During this thirty-minute period, Respondent had the option to either shower or exercise on a weight machine within the unit corridor. Respondent was permitted absolutely no contact with other prisoners within ADU or with the general prison population. Once every seven days, Respondent was taken to a segregated concrete yard to exercise. Respondent was permitted one telephone call per month which had to be made in the presence of a counselor, guard or

case manager. Any communication with other inmates was prohibited. (J.A. 17-18)

On November 21, 1978, Respondent Reynoso was interviewed by agents of the Federal Bureau of Investigation (FBI). Respondent was not advised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1965) (J.A. 15, 23). Nevertheless, Respondent requested that he be provided an attorney. Respondent was told by the FBI agents that he didn't need one since he was going to be released the next day. (J.A. 15) During the interview, Respondent told the FBI that on November 11, 1978, he watched several football games, including one between Oklahoma and Nebraska. Respondent told the FBI that he watched these games with inmate Pedro Flores and a white male who resided in "J" Unit, in cell E-18. In the early afternoon, (2:00 p.m.) he went to the gym and worked out. He told the FBI this could be verified by a black officer who was working in the gym. Respondent also told the FBI that after the work-out, he played shuffle-board with an inmate by the name of "Sam" who resided in "C" Unit. (J.A. 23-24)

On November 22, 1978, Respondent, as advised by the FBI, was released to the general prison population and placed in "J" Unit. Respondent believed that he had been cleared of the charges. (J.A. 15, 19) It is not known if the FBI attempted to locate and interview any of the individuals mentioned in its "Report of Interview" of Respondent.

On December 4, 1978, Respondent was again placed in ADU. He was told that he was being held pending the criminal investigation for the murder of Thomas Trejo. From December 4, 1978 to the present, respond-

ent has been segregated from the general prison population at Lompoc, California. (J.A. 15)

On December 15, 1978, and again on December 21, 1978, respondent appeared before the Prison Administrative Disciplinary Committee. Respondent requested appointment of an attorney and was denied said request. He also requested the presence of a prison guard named Vernel Phillips. However, no attempts were made by prison officials to produce Mr. Phillips for the hearing. Instead, Respondent was told that Mr. Phillips was no longer employed by the Federal Correctional Institution at Lompoc. No witnesses were produced at the hearing by prison officials. (J.A. 15-16)

From December 4, 1978, until Respondent's arraignment on July 14, 1980, Respondent remained in ADU and without assistance of counsel. No investigation was conducted; no evidence was preserved on behalf of the Respondent; no witnesses were interviewed; and no statements were recorded.

The United States Attorney's Office was involved in the case as early as January, 1979. The Grand Jury commenced its consideration of the case against Respondent in March, 1979. (Tr. D. 126-128)<sup>1</sup>

The Government, by March, 1979, had virtually completed its investigation into the murder of Trejo. All witnesses called before the Grand Jury, and known to the Government at the time of indictment, had been located and interviewed prior to June, 1979. Dr. Gee, who performed the autopsy of Trejo, was available to

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<sup>1</sup>"Tr. B" signifies the transcript of the pre-trial hearings in the case of the Gouveia respondents.

the Government as early as November 11, 1978. (Tr. 147)<sup>2</sup> Richard Villalobos, an inmate, was interviewed as a cooperating Government witness in June, 1979. (Tr. 220-221, 297-298) The principal witnesses at the Grand Jury proceeding, including Willard Taylor, a prison inmate, were known and available as early as November, 1978. (Tr. 880-881) No new percipient witness became available to the Government between June, 1979 and the date of indictment. Virtually all scientific evidence was completed by April, 1979. No significant investigative activity was engaged in by the Government after June, 1979. (Tr. 393, 434)

In contrast, the defense lost the ability to develop a qualitatively sound defense.

Although Respondent placed on the stand at his trial two witnesses, Pedro Flores and Harlen Ferguson, who testified that they were with Respondent in "J" Unit watching football, no witnesses could be located who could testify about the subsequent activities of Respondent. For example, the black prison guard could not be located to corroborate that Respondent was at the gym in the early afternoon at approximately 2:00 p.m.—a time within which the murder could have been committed. This inability to locate this witness resulted despite the fact that Respondent told the FBI that a black officer working in the gym could verify that Respondent was at the gym in the early afternoon at about 2:00 p.m. (J.A. 23) The inmate named "Sam", with whom Respondent

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<sup>2</sup>"Tr." signifies the transcript of the re-trial in the case of the Gouveia respondents.

told the FBI that he had played shuffle-board, could not be located and was not produced.<sup>3</sup>

Trial began on September 16, 1980. The jury acquitted Flores on all counts and acquitted Respondent Reynoso on the weapon conveyance count. However, the jury was unable to reach a verdict on the "murder and conspiracy charges against Respondents, and a mistrial was declared on those counts". (J.A. 1)

On February 2, 1981, Respondents resubmitted their motion to dismiss the indictment on the ground that they had been denied their right to a speedy trial, due process of law, and effective assistance of counsel. The motions were considered and denied. (Tr. D. 7-8)

## 2. The Decision of the Court of Appeals

The en banc Court of Appeals consolidated the *Gouveia* and *Mills* cases. By a vote of six to five, it reversed the convictions and remanded for dismissal of the indictments. The Court of Appeals held that an indigent inmate held in administrative detention beyond ninety days for the purpose of isolating him from the general prison population pending a criminal investigation, or trial for a criminal act, must be afforded an attorney at Government expense in order to preserve assurances of a fair trial. *United States v. Gouveia*, 704 F.2d 1116 (9th Cir. 1983).

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<sup>3</sup>The above testimony was relevant to impeach the testimony of Gene Newby. Gene Newby did not testify at the first trial. During the second trial, Newby testified that Reynoso, along with Pedro Flores and the Gouveia Respondents were in "H" unit in the early afternoon shooting-up heroin and tearing up and flushing down the toilet bloody clothes. (Tr. 1011-1013, 1153-1157)

The Court reasoned that when administrative detention "is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory". (Pet. App. 15a)

The Court, having concluded that the circumstances of the present case gave rise to the right to counsel, fashioned a rule which preserves the right to effective assistance of counsel without impairing the authority of prison officials to carry out their administrative responsibilities. (Pet. App. 15a) The Court held that "(i)f an inmate is held after the maximum disciplinary period has expired, he should be allowed to show that his detention, at least in part, is due to pending investigation or trial for a criminal act." (Pet. App. 17a) If the inmate establishes indigency and requests counsel, "prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population". (*id*) The court concluded that the Government's refusal to appoint counsel to Respondents denied them effective assistance of counsel and, therefore, a fair trial. (Pet. App. 23a)

The court, having concluded that the Government's conduct in this case resulted in harm which pervaded the entire trial and thus resulted in harm which was not capable of after-the-fact remedy, concluded that Respondents were in a position similar to suspects who were denied a speedy trial. Thus, dismissal of the indictment was the only certain remedy. (Pet. App. 20a-21a)

The court further reasoned that mere quantity of witnesses is not dispositive to the issue of prejudice. Quality

of witnesses is also a significant factor which must be weighed. A large quantity of witnesses with faded memories creates its own prejudice due to a lack of weight such testimony would receive. The problem of "dimming memories of witnesses whose testimony the defense had no opportunity to record at a time when events were fresh" (Pet. App. 23a) was a prejudice created by the isolation of Respondents and the concurrent refusal to appoint counsel who could have preserved such testimony.

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#### **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Court of Appeals held that the Sixth Amendment requires appointment of counsel for indigent inmates held in administrative detention for more than ninety days pending a criminal investigation. It held further that dismissal of the indictment is the proper remedy for failure to provide counsel under such circumstances.

1. Respondent was placed in the administrative detention unit at Lompoc after being identified as a suspect in a prison murder. The Respondent was interviewed by the FBI. During the FBI interview, Respondent requested appointment of counsel. It was denied. Approximately six weeks after the murder, a administrative disciplinary hearing was held. Respondent at that time requested appointment of counsel. That request was denied.

Respondent remained in ADU from December 4, 1978 until June, 1980. He was kept in ADU beyond a ninety-day period pending investigation for a criminal act. (J.A. 85-88). During the nineteen month period, Respondent's defense case deteriorated substantially. Respondent was

unable to locate two witnesses who could have testified as to Respondent's activities during the early afternoon; a time when the murder could have been committed. A Michael Thompson, who the defense contended had actually committed the murder, died of natural causes before counsel was appointed to Respondent. Other witnesses had observable diminished memories.

Respondent argues that the right to counsel is essential to a fair trial. In a prison setting, the right to counsel should attach in order to enable a prison inmate segregated in ADU for an indeterminate period of time the ability to preserve his defense. Only counsel may ameliorate the disadvantage of a segregated inmate in preparing and securing the means to present a defense at trial.

2. Respondent's segregation in ADU was the functional equivalent of an arrest. Respondent suffered the indicia of arrest set forth in *United States v. Marion*, 404 U.S. 307, 320 (1971). Had Respondent been outside prison as a free man and subjected to an equivalent detention, the Government could not have detained him for an unreasonable period of time without bringing formal charges. However, in the prison context, the Government was able to detain the Respondent for an indeterminate time without filing formal charges. During the pre-indictment period, the Government systematically built its case; while the Respondent was functionally under arrest.

The segregation of Respondent for an indeterminate period of time and the manner in which the Government conducted its investigation, indicates that the Government had committed itself to prosecute. At that point, the prosecutorial forces of society were focused on the Respondent. This commitment to prosecute by the Government coupled

with the functional arrest of Respondent, requires that counsel be appointed prior to indictment in order to protect Respondent's right to a fair trial.

3. The remedy of dismissal was appropriate in Respondent's case due to the presence of actual prejudice. Respondent lost the resources to present a complete defense. Two witnesses could not be identified and located who could testify as to the activities of Respondent in the early afternoon on the day of the murder. This was critical because the murder could have occurred in the early afternoon. Additionally, the Respondents demonstrated that their witnesses did in fact have poor memories as to the events of November 11, 1978—the date of the murder.

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## **ARGUMENT**

### **I. The Sixth Amendment Requires That Counsel Be Appointed For An Indigent Prison Inmate When The Inmate Is Intentionally And Continuously Isolated From The General Prison Population, An Administrative Decision Has Been Made That The Inmate Is Guilty, And He Is The Subject Of A Continuing Criminal Investigation.**

The Court of Appeals decision achieves a proper balance of interests of both prison officials and inmates suspected of crime. It does not prohibit the prison system from placing an inmate in ADU, nor does it require appointment of counsel where an inmate is placed in ADU for purely administrative reasons, such as protection of other inmates. The Court of Appeals does require that

in order to insure effective assistance of counsel and thereby a fair trial, counsel be appointed to those inmates who are continuously segregated from the general prison population, who have been kept in segregation for more than ninety (90) days, and are the subject of a continuing criminal investigation or are pending trial. (Pet. App. 14a-18a).

The underlying rational for the Court of Appeals holding is to assure that the accused will receive effective assistance of counsel by providing counsel at a point in time when he can be effective in preserving a defense. (Pet. App. 16a)

#### **A. The Sixth Amendment Protects A Person's Right To A Fair Trial.**

The right to counsel is more than mere formalism; it is central to the right to a fair trial. The right goes beyond the attorney's mere presence at formal judicial proceedings. *McMann v. Richardson*, 347 U.S. 759 (1970). The concept of the right to counsel:

" . . . is central to that principle that . . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court, or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . "

*United States v. Wade*, 388 U.S. 218, 226-27 (1967).

Counsel is an instrument utilized to insure the right to a fair trial. Therefore, not only must counsel be provided to an indigent person at the trial of a criminal pros-

ecution, *Gideon v. Wainwright*, 372 U.S. 335 (1963), but, counsel must be appointed at a point in time when counsel can be effective in preserving the right to a fair trial. *United States v. Wade*, 388 U.S. 218, 226-27 (1967); *Powell v. Alabama*, 287 U.S. 45 (1932).

This Court, in *Powell v. Alabama*, stated that the duty to appoint counsel:

"is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Appointment of an attorney at a meaningful stage after the Government has detained an inmate-suspect in ADU, due to a continuing criminal investigation, or for trial, is necessary to provide a defendant with the means to prepare and preserve his version of the facts at trial. Without the means to preserve, and thus present his case, the adversary system's entire integrity becomes suspect. Where the defendant is unable to fully present his case, the adversary system becomes a one-sided proceeding in which only the Government is in a position to develop and present its case.

That the defendant must have a fair opportunity to present his evidence to the trier of fact is a cornerstone of the adversary system of criminal justice. In *United States v. Nixon*, 418 U.S. 683, 709 (1974), the court addressed this issue:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice

would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on a full disclosure of all the facts, within the framework of the rules of evidence.

The Petitioner appears to suggest that the Respondent's production of two alibi witnesses is dispositive of the issue of prejudice created by the absence of counsel. (Pet. Br. 56-58) What the Petitioner fails to recognize is that it is the quality of witnesses that determine lawsuits, not mere numbers. Additionally, the ability to present a small portion of the facts does not equal an effective defense.

The Respondent was able to present to the jury evidence of his activities on the morning of the murder. However, no evidence was produced as to his activities during the early afternoon of the same day. This was critical because the time of death was approximated to have occurred between 12:00 noon and 1:00 p.m., with a range of one hour in either direction. (Tr. 160, 162-63) That is, the murder could have occurred at 2:00 p.m., if not later. Respondent told the FBI on November 21, 1978, that in the early afternoon at about 2:00 p.m. he was in the gym playing shuffel-board with an inmate named "Sam" from "C" Unit. He told the FBI that the above fact could be verified by a black guard who was in the gym. (J.A. 15, 23-24)

Respondent was unable to either identify or produce the black guard from the gymnasium. The guard could have testified that in the early afternoon he had seen the Respondent at the gym. Respondent was also unable to

locate the inmate named Sam, who could have testified that in the early afternoon, at approximately 2:00 p.m., he was playing shuffle-board with the Respondent. These individuals were not fabrications by Respondent months after the murder. The existence of these individuals as potential witnesses for the defense was made known to agents of the Government as early as November, 1978. (J.A. 23-24) To summarize, Respondent was able to produce two witnesses who could account for a portion of the time at which the murder could have occurred, but not for all of the time. The inability to produce reliable evidence as to a portion of the critical time made the defense far less persuasive than it would have been if the defense had been able to identify and produce the above-mentioned persons. See *Chambers v. Mississippi*, 410 U.S. 284 (1972).

The mere opportunity to present some evidence as to a fact in dispute is insufficient if a defendant is precluded from presenting additional evidence which, if believed, would make the defense far more persuasive. *Chambers v. Mississippi*, *id.* In *Chambers v. Mississippi*, the Court held that the trial court's refusal to allow testimony of three impeachment witnesses constituted reversible error. The Court held that the exclusion of the witnesses made the defense far less persuasive, and, therefore, the defendant had been denied due process of law. The Court reversed the conviction even though the defense had produced substantial evidence in support of its defense theory. As in *Chambers*, the issue is not whether the Respondent was able to produce some portion of the evidence in support of his defense, but whether he was denied the right to produce a persuasive defense.

The failure of a defense counsel to present important evidence due to incompetency is no more prejudicial to a defendant than the failure to present that same evidence due to its unavailability to defense counsel. If a defendant can not present a sound defense, due to his inability to preserve evidence, is he any less harmed in his defense than the defendant in *Chambers v. Mississippi*, who was not permitted to produce all the relevant evidence which was available? The answer must surely be that the denial of a fair trial is the same to a defendant whether the denial is the result of incompetency of counsel, an incorrect ruling of the trial court, or the inability of counsel to present evidence which has been forever lost.

Petitioner attempted to minimize the effect of the absence of counsel on the Respondent's ability to preserve and present an effective defense. The denial of a fair trial was a result of what counsel was unable to do because of the lengthy pre-indictment period. Contrary to the Petitioner's contention (Pet. Br. 58), there was substantial prejudice to the Respondent due to his loss of witnesses and the low reliability of defense witnesses resulting from their demonstrated poor memories.

The Respondent's affirmative defense was that Michael Thompson and two Government witnesses—Steve Kinard and Willard Taylor—had committed the murder of Trejo. While Steven Kinard and Willard Taylor admitted assisting in the murder by disposing of the murder weapons, they denied any association with Michael Thompson (Tr. 2096-2111, 2222-2232, 2483-2495)

A witness was called in an effort to establish that Michael Thompson had in his possession, on the date of

the murder, a bundle that appeared to contain steel knives. That witness, Tony Estrada, had a demonstrably faded memory. In this regard, the trial court itself made the following observation:

THE COURT: Well, the Court has to rule as it sees fit, using its discretion. This witness's memory is at best a faded pastel of what was once a brilliant picture. Whether it ever encompassed the name of the decedent, his nickname, the fact that anybody had been put in segregation, is of extreme doubt to the Court. And I think because of the fact his recollection is so deficient in so many areas, that there must be a specific demonstration of when this event occurred. Now, that's the foundation that's necessary. If that's made, then these matters are admissible. That will be the ruling of the Court. (J.A. 117)

Clearly, this witness's lack of memory clouded his reliability and, therefore, his credibility. The fact that Michael Thompson had a set of knives on the date of the murder could not be convincingly proven.

Faded memory was also demonstrated by a number of other witnesses, including Antonio Palacios, (J.A. 93-98) Raymond Olvera, (J.A. 98-102) and Stephen A. Broughton. (J.A. 102) As to each of these witnesses, the prosecution's line of cross-examination was to demonstrate a lack of certainty and a lack of recollection as to their testimony. (J.A. 94-97, 100-102, 105, 107-108) It was also demonstrated by Mr. Broughton that this lack of recollection was due to both the passage of time and the fact that the witnesses made no efforts to record their recollections. (J.A. 105) Additionally, no one on behalf of the Respondent contacted them in 1978 or even 1979 to take statements and attempt to preserve their memory of the events occurring on November 11, 1978.

Michael Thompson, the person the defense contended was (along with Government witnesses Kinard and Taylor) involved in the murder, died of natural causes in June of 1979. The death of Michael Thompson denied Respondent the opportunity to call Thompson as a hostile witness and have him subjected to cross-examination. Since an attorney was not appointed to represent Respondent until after the death of Thompson, his testimony was not preserved. Thus, Respondent was frustrated in his attempt to demonstrate to the jury that Thompson was one of the murderers, along with Kinard and Taylor.

The deficiencies of the Respondent's affirmative defense occurred despite the fact that Respondent adopted a course of conduct consistent with the remedies suggested by the Petitioner. (Pet. Br. 36-39) That is, Respondent told the FBI about his witnesses. That the statements of Respondent were preserved by the FBI has never been in dispute. However, the mere preservation of the statement did not enable Respondent, some twenty months after the murder, to locate either the inmate named "Sam" or the black guard who was at the gym.

Respondent's situation demonstrates the hollowness of Petitioner's bare assertions that an inmate-defendant held in segregation pending criminal investigation or trial may preserve a defense by surrendering his right against self-incrimination. Respondent gave up that most basic of rights on November 21, 1978, but it was not enough to preserve a critical portion of his defense.

The Petitioner's suggestion that if Respondent wanted to prepare a defense he should have used a "staff

"representative" is contrary to the most basic and long recognized right against compulsory self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Petitioner ignores the fact that the staff representative is a government employee and that there is no attorney-client privilege. Petitioner's position that an innocent inmate would not reasonably fear that the information given to staff member would be used against him indicates a naivette about the adversary positions of the Respondent and the Government (and its agents). Petitioner surely does not seriously contend that a staff representative could decline to testify against a defendant on the grounds of attorney-client privilege.<sup>4</sup> Whether the staff representative does or does not desire to act as a spy is immaterial, since the prosecutor can make him a spy merely by asking, "What did he tell you?"

The remedies suggested by Petitioner are simply unconstitutional. Further, they can not provide "the guiding hand of counsel" that the Court in *Powell v. Alabama*, 287 U.S. 45, 49 (1932) found essential.

The record reflects that Respondent was denied a fair trial due to the absence of counsel at a time when he was segregated from the general prison population. The issue remains whether he was entitled to appointment of counsel prior to the Government's filing of the indictment.

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<sup>4</sup>Section 950 of the California Evidence Code defines "Lawyer" to mean: "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." It is clear that a "staff representative" even a counselor or social worker does not fall within the definition of a lawyer.

**B. Segregation Of Respondent From The General Prison Population Pending A Criminal Investigation or Trial is the Functional Equivalent of an Arrest and Accusation.**

Petitioner concedes that Respondents were kept in administrative detention because of the pendency of the criminal investigation regarding the murder they were suspected of committing. (Pet. Br. 26) The United States Attorney's office was involved in the criminal investigation as early as January, 1979. (Tr. B. 128) The Grand Jury was considering evidence as early as March 1979. (Tr. B. 128) In reality, the Respondents were held in segregation for an indeterminate period of time.

The Court of Appeal recognized that "whether a person stands accused can only be determined from the totality of the circumstances." (Pet. App. 8a) Under the circumstances of this case, the segregation of Respondent was accusatory; it was a "public act" which was functionally equivalent to an arrest. (Pet. App. 15a) In *United States v. Marion*, 404 U.S. 307, 320 (1971), this court set forth the constitutionally significant indicia of arrest for purposes of triggering the Sixth Amendment right to a speedy trial:

" . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.

Each of the *Marion* incidents of arrest are present in this case where Respondent was placed in a "prison within a prison". Respondent's detention deprived him of the privileges, jobs, and activities of the general prison

population; deprived him of all contact with the general prison population; stigmatized him in the eyes of the prison population; subjected him to possible inmate retaliation; created in him, his family and friends justifiable anxiety; and precluded him from preparing a defense. (JA 15-20)

The Court of Appeals reasoned that where an inmate is isolated, pending a criminal investigation or trial for a criminal prosecution, the detention is related to the subsequent prosecution. Additionally, the detention under such circumstances:

[F]urther[s] many of the same governmental interests served by an arrest outside the prison walls. The Supreme Court has recently recognized that confining inmates to administrative detention pending completion of the investigation of disciplinary charges serves the important need of investigative officers to protect witnesses and evidence, to facilitate an effective investigation, and to prevent further criminal activity by the suspect. *Hewitt v. Helms*, 103 S.Ct. 864 (1983). These interests are important for nonprison crimes and in that situation they lead to an arrest at the earliest possible point. But they are important also for serious prison crimes where the insular character of the inmate population creates unique investigatory and evidentiary hurdles for the prosecution and leaves potential witnesses particularly vulnerable to retribution and coercion. The critical fact is that for prison crimes the Governmental interests that dictate the isolation of suspects do not lead to an arrest, nor prompt the early initiation of formal judicial proceedings, but rather cause the isolation of suspected inmates in administrative detention for what can be an indeterminate period. (Pet. App. 11a)

Respondent's detention under the facts of their case amounts to the functional equivalent of an arrest and accusation.

Petitioner argues that even assuming that Respondent's situation is similar to an arrest, it is not detention by law-enforcement authorities that triggers the right to counsel, but rather the decision by prosecutors to initiate formal adversary judicial proceedings.<sup>5</sup> (Pet. Br. 29) The Petitioner further states:

The Court of Appeals invoked cases involving the Sixth Amendment right to a speedy trial in support of its arrest analogy. (Citations) But the decisions in those cases make clear that the speedy trial right is not triggered merely by arrest or detention; instead both arrest *and* holding to answer a criminal

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<sup>5</sup>The petitioner's position relying on *Kirby v. Illinois*, 406 U.S. 688 (1972) (Plurality decision) that counsel attaches only at or after the time that adversary judicial proceedings have been initiated against an accused, and that initiation of adversary judicial proceedings are limited to formal charge, preliminary hearing, indictment, information or arraignment (Pet. Br. 19-21) is not supported by an examination of this court's decision which continue to enjoy constitutional force.

Right to appointment of counsel is not dependent upon the initiation of formal judicial proceedings. Both *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966), involve situations in which no formal judicial proceedings, as delineated in *Kirby v. Illinois*, had occurred. Although, the plurality in *Kirby* stated that the "prime purpose" of *Escobedo* and *Miranda* was not intended to vindicate the Sixth Amendment right to counsel, but rather to ensure full effectuation of the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination (which if waived might render any subsequent trial a mere formality), 406 U.S. at 688, 689. *Miranda* and *Escobedo* continue to require that when an indigent individual is in custody and that individual requests the presence of counsel, he must, if indigent, be provided with counsel before any interrogation may take place.

charge (*which is necessary if authorities are to continue to hold a suspect*) are required in order to engage the right to a speedy trial. (Emphasis added). (Pet. Br. 30)

Petitioner's reliance on *United States v. McDonald*, 456 U.S. 1, 7 (1982) and *United States v. Marion*, 404 U.S. 307, 320 (1971) for the proposition that the speedy trial right is not triggered merely by arrest or detention and instead both arrest and holding to answer a criminal charge trigger such right ignores *United States v. Marion*'s own language, which states in part:

So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraint imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. 404 U.S. at 320-321. (Emphasis added).

The Court in *United States v. Marion* and *United States v. McDonald* assumed that a person could not be held under arrest for an indefinite period of time without the filing of charges. Petitioner concedes as much.

What makes this case unique is that the Government was able to both detain and continue to hold the suspect for an indefinite period of time without filing formal charges. In Respondent's case, the Government was able to segregate him from the general prison population and

subject him to all the indicia of arrest for an indeterminate period of time without the necessity of filing criminal charges. During the twenty month period the Government built its case. During the same period, the ability of the Respondent to preserve his case eventually faded away.

The right to counsel should not be dependent upon the decision of a prosecutor as to when to file an indictment. The right to counsel should attach at the point in time when it is clear that a person is being detained for an indeterminate period of time as a suspect in a criminal investigation.

The Court of Appeals' determination in this case is correct for the additional reason that the Government's actions evidenced a commitment to prosecute. A commitment to prosecute can occur at a time prior to the formal filing of charges.

This Court in, *Coleman v. Alabama*, 399 U.S. 1 (1970) (plurality decision), held that, even though no formal charges were pending at the time of the preliminary hearing and even though the accused had not yet been held to answer charges (since the grand jury had not at that time indicted), the accused was entitled to appointment of counsel at the preliminary hearing. Counsel was required even though the preliminary hearing magistrate could not indict, but could merely make a determination that further inquiry by the grand jury was warranted. 399 U.S. at 24 (C.J. Burger dissent) At the time of the preliminary hearing, the State had committed itself to prosecute, even though no formal charges had been filed. A plurality of the Court required counsel because the

preliminary hearing is a "critical stage" of the criminal process. 399 U.S. 9.

The Court in *Coleman* went on to explain that even though the state was precluded from introducing testimony given at a pre-trial proceeding, where a defendant did not have benefit of counsel, and even though the defendant did not risk loss of defense not asserted at the preliminary hearing, counsel was necessary to safeguard against "potential substantial prejudice to defendants rights" to a fair trial. The benefit of counsel is required under *Coleman* even though the state could, after the preliminary hearing, decide against seeking indictment, or even though a judicial officer could determine that further inquiry by the grand jury was not necessary.

In *Moore v. Illinois*, 434 U.S. 220 (1977), a case factually similar to *Coleman*, this Court held that the preliminary hearing marked the initiation of adversary judicial criminal proceedings where a citizen's complaint had been filed and the accused was subjected to a preliminary hearing. In *Moore*, *id.* at 228, the court concluded that the time at the preliminary hearing the state had committed itself to prosecute.

However, no formal charges by way of information, or indictment had been brought, and the Government could have abandoned prosecution at any time prior to indictment. In both *Coleman v. Alabama*, and *Moore v. Illinois*, the state was represented by counsel, though it had not filed formal charges. As the court in *Kirby v. Illinois*, 406 U.S. at 689, stated, the initiation of adversary judicial criminal proceedings is far from a mere formalism. "It is only then that the Government has committed itself to prosecute, and only then that the adverse posi-

tions of Government and defendant have solidified . . ." *ibid.*

In Respondent's case the Government manifested its commitment to prosecute by holding Respondent indeterminately segregated in ADU due to a criminal investigation; by its commencing of Grand Jury proceedings in March, 1979; and by the intimate involvement of the United States Attorneys Office as early as January, 1979. This commitment to prosecute was further manifested by the Government's indictment of Respondent despite the fact that all addititonal invesigtation conducted after June 1979 was negative as to Respondent.<sup>6</sup>

It is fiction in this case to contend that the Government had not committed itself to prosecute prior to June 1980. To uphold the Petitioner's position that the Government has only committed itself to prosecute after an indictment was filed, creates a fundamentally unfair situation which allows a suspect to be indeterminately detained, while the Government at its leisure prepares its case for trial.

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<sup>6</sup>The Government had available by December 26, 1978, with the exception of one witness who became available in June, 1979, all the witnesses that it used to obtain an indictment in June, 1980. For example, Willard Taylor was available in early November, 1978, Armando Macias was available November, 1978; Edward Chaparro was available December 26, 1978. The one exception Richard Villalobos became available in June, 1979.

The scientific evidence was virtually completed by April, 1979. The blood and footprint analysis was completed in April, 1979. (Tr. 393, 434) The autopsy analysis was completed in November, 1979. (Tr. 147) Initial fingerprints analysis was completed in March, 1979. Additional fingerprint comparisons were conducted in October, 1979, however, these additional comparisons also proved negative against Respondent. (Tr. 472)

The Government in the present case, as the prosecution in *Coleman v. Alabama*, 399 U.S. 1 (1970) and *Moore v. Illinois*, 434 U.S. 220 (1977), committed itself to prosecute before the formal charges were filed. The fact that the Government could theoretically have decided not to file charges is unpersuasive in light of the indeterminate detention of Respondent which had all the indicia of arrest.

Petitioner's reliance on *Kirby v. Illinois*, 406 U.S. 682 (1972) for the proposition that Respondent's right to counsel in the context of the facts of this case attaches only after indictment ignores the fundamental distinction between the facts of Respondent's case and those in *Kirby*. In *Kirby*, a suspect was arrested by police officers. The police conducted a station house identification procedure to determine if the victim could identify him as the robber. At the time of the identification procedure no prosecuting attorney participated, no grand jury was considering formal charges, and no attorney for the prosecution was systematically developing a case against the suspect.

The facts of Respondent's case more closely resemble those of *Coleman v. Alabama*, 399 U.S. 1 (1970) than those of *Kirby v. Illinois*, *id.* The Government attorney had a continuing interest in the prosecution of Respondent. Respondent was detained for an indeterminate period as a suspect pending the criminal investigation.

The Petitioner's position that right to appointment of Counsel in a prison setting and under the circumstances of this case be determined solely by the filing of an indictment is to leave the triggering of that right, and its consequent right to a fair trial, totally in the hands of the prosecution, without regard to the fact that it has in

reality committed itself to prosecute. It is apparent that the Government intended to prosecute. The theoretical possibility that it might not may be sound analysis where a person is not subject to the indeterminant curtailment of liberty, see *Hoffa v. United States*, 385 U.S. 293, 310 (1966); and, *United States v. McDonald*, 456 U.S. 1 (1982), but it should not apply where a defendant is held in an indeterminate segregation status amounting to the functional equivalent of arrest and accusation.

The Ninth Circuit opinion is consistent with the concept of effective representation of counsel. At the same time, the Ninth Circuit's opinion is nevertheless narrow in scope. It requires a number of pre-conditions to exist before the right to appointed counsel attaches. The inmate must be in isolation from the prison population; he must be in isolation beyond a ninety (90) day period; he must be detained in isolation at least in part due to a felony investigation or for criminal trial; and he must be indigent. The Government is not obligated to provide counsel if the inmate is not indigent, nor is counsel required if he is in isolation due to purely administrative reasons. Additionally, the inmate in isolation must request the appointment of counsel. The rule provides the flexibility needed to accommodate legitimate administrative concerns, while at the same time assuring the inmate a fair trial.

## **II. Dismissal Was the Appropriate Remedy in the Present Case.**

This Court, in *United States v. Morrison*, 449 U.S. 361, 365 (1981), stated that the remedy for Sixth Amendment deprivations should be tailored to the circumstances, so as to assure the defendant effective assistance of coun-

sel and a fair trial. The Court in *United States v. Morrison, supra*, did not find adverse effect on the right to effective assistance of counsel by the mere fact that Drug Enforcement Agency agents attempted to solicit the defendant's cooperation without the presence of her attorney. In the present case, however, the Ninth Circuit recognized that Respondent's isolation without assistance of counsel handicapped Respondent's ability to defend himself at trial. (Pet. App. 23a)

The Ninth Circuit further recognized that:

"Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of the delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants." (Pet. App. 20a)

The prejudice suffered by the inability to locate inmate witnesses (whose names are not known); the inability to produce witnesses whose recollection of events are preserved by written statements; and the loss of witnesses due to death, are not within the class of prejudice that can be cured by a cautionary instruction to a jury, or by suppressing the introduction of Government evidence. The prejudice pervades the entire trial.

The dissenting opinion's contention, adopted by Petitioner, that "the likelihood of exonerating testimony from absent witnesses is preeminently a factual matter for the jury's determination . . ." (Pet. App. 28a-29a), fails to recognize the impossibility of introducing into evidence the expected testimony of a dead witness who has never

either testified or been interviewed. At the district court level such exonerating testimony from Michael Thompson, a deceased witness, was rejected by the trial court. An admission by Michael Thompson that he, along with Steven Kinard and Willard Taylor, had killed Thomas Trejo was rejected as untrustworthy hearsay. (Tr. 2096-2111)

The dissent's remedies fail to deal with the basic issue of fairness. It excuses indeterminate detention, unjustified delay by the Government (and the real advantage it thereby gained), and suggests that competent and vigorous counsel could not have assisted in the preservation of a defense if appointed some thirteen monthes earlier. The dissent also equates effective assistance of counsel with technically competent counsel. It fails to recognize, as this court recognized in *Powell v. Alabama*, 287 U.S. 45 (1932); *Escobedo v. Illinois*, 378 U.S. 478, 487-488 (1964); and, *United States v. Marion*, 404 U.S. 307, 327 (1971); that appointment of counsel to one accused must come at a point in time where counsel can be effective. The most competent of counsel can not raise the dead, restore lost memories, or locate those whose names are no longer known or capable of being known.

The Ninth Circuit majority recognized the particular need of an indigent inmate who has been isolated pending a criminal investigation for the appointment of counsel. It recognized that the defense had been permanently handicapped by the long delay and the concurrent failure to appoint counsel. Unlike the facts present in *United States v. Morrison*, *supra*, respondents were prejudiced by the absence of counsel at a critical stage in the proceeding. The result reached by the Ninth Circuit was warranted under the facts of the case.

**CONCLUSION**

Based on the foregoing, the respondent Adolpho Reynoso urges that the Government's Petition be denied.

Respectfully submitted,

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